ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS

Kevin Lausman d/b/a Communications Service Center (Lausman) hereby submits reply comments in the above captioned rule making. Lausman is an owner and operator of SMR facilities within the State of Florida and possesses many years of experience in the construction and operation of SMR facilities. He is, therefore, qualified to provide the Commission with valuable assistance in its review of the matters contained within this proceeding. Additionally, Lausman has a keen interest in the outcome of particular issues raised within this proceeding by Nextel Communications, Inc. (Nextel).

Lausman vigorously opposes Nextel's proposals as detrimental to the marketplace, unnecessary for the continued dynamic operation of SMR facilities throughout the Country, and as an act of arrogance which cannot and should not be tolerated by the Commission.

Nextel's Basis Is Flawed

The basis for Nextel's request is that it believes itself entitled to regulatory parity with cellular and PCS operators. Its stated belief arises out of recent actions by the United States Congress in creating the new designation of carrier known as Commercial Mobile Radio Service carrier (CMRS). Following Nextel's reasoning, the Commission is supposed to hold that Nextel is a CMRS operator and cellular carriers are now governed under CMRS and PCS operators are to be governed under CMRS, ergo Nextel is entitled to receive all rights, benefits, duties and regulatory treatment as that accorded cellular and PCS operators.

Nextel's argument is first flawed in its claim to be a CMRS operator. Lausman can find no basis for this claim and doubts that any such status shall ever be afforded to Nextel by the Commission. Lausman's doubts arise out of his earlier filed Opposition to Nextel's request for waiver of the foreign ownership standards for operation of a CMRS facility, see, attached. Nothing produced by Nextel in response to Lausman's Opposition answers the charges made therein in a manner that is supported by law or fact.

In fact, within its response to Lausman's Opposition, Nextel admitted that it could not qualify for waiver of the foreign ownership rules, but that its lack of qualifications was not relevant, since its licenses were held or to be held exclusively by its wholly-owned subsidiaries. Accepting, *arguendo*, Nextel's earlier argument that the status of

the parent corporation is not relevant in determining duties to the Commission, then any benefits would also run only to the subsidiaries. Yet, in its comments, Nextel states that the parent corporation will be the CMRS carrier. Nextel cannot have it both ways between two proceedings. It must decide with finality which entity in its chain of subsidiaries, parents and affiliates will accept the duties and responsibilities attendant to being a Commission licensee. These corporate shenanigans are useless and distracting and should not be tolerated by the Commission.

Lausman suggests that the Commission accept Nextel at its word within its most recently filed comments. Nextel has therein claimed that the parent corporation is seeking parity as a CMRS carrier. When the Commission applies this claim to the other pending matter, the Commission's course will be clear, it must deny Nextel's request for waiver of the Commission's foreign ownership rules and take whatever steps that are necessary to remove from Nextel all authority arising or which might arise out of its failure to comply with such rules. One action, which Lausman respectfully suggests would be prudent, would be to summarily deny and reject Nextel's proposals made herein. If not even Nextel would benefit by grant of its proposals, it appears that its request has been rendered moot.

To assist the Commission in determining the proper course in dealing with Nextel's moving corporate target, Lausman attaches hereto and incorporates herein his

earlier filed Opposition. A rereading of the contents of the Opposition and Nextel's response thereto shall fully demonstrate Nextel's lack of candor before the Commission.

Promises and Puffery

Within its comments, Nextel again blows clouds of smoke and flashes walls of mirrors to distract and confuse the Commission. Lausman does not believe the Commission shall be so easily fooled. The puffery regarding the value of Nextel's service and technology have become tired as the market waits longer and longer for Nextel to construct even one viable ESMR system. Given the billions of dollars collected by Nextel from corporate sponsors and public offerings, it would seem to even the most forgiving of persons that Nextel should have been able to construct one working system. Still the market and Nextel investors are made to wait.

It would appear that given the billions of dollars and thousands of channels snatched up by Nextel across the Country, it should be capable of constructing a system which is not dependent on special spectrum allocations and reshuffling of competitors' systems. Instead, most of Nextel's spectrum lies fallow, awaiting some day in the future, unknown to Nextel itself, when service will be provided to the public.

By now the Commission should have expected to see great and marvelous results from its magnanimous act in granting Fleet Call, Inc.'s waiver request. The service to be brought to the public which was to replace the need for cellular radios, pagers,

dispatch radios, and mobile faxes, should by now be in place. But, unfortunately, no such service exists. A scant 5,000 ESMR users are claimed by Nextel at this time and, by its own admission, those poor users are suffering an inferior service.

Yet, rather than coming to the Commission with the humility that such a dismal failure would have inured to lesser companies, Nextel is before the Commission claiming that the problems it suffers are due to lack of regulatory parity. It has conveniently forgotten that what it now has, including its enormous advantages over competing SMR operators, was tailored to its own requests. In other words, Nextel would have the Commission believe that it is a victim of regulatory circumstance rather than its own mismanagement or improper system design. One may not agree with Nextel or accept a single premise upon which its comments precariously rest, but one must admire the gall.

That is, one might admire Nextel, if one were not being asked to pay the price of Nextel's temerity. Unfortunately, traditional SMR operators will pay dearly if Nextel's proposals become rule and their end users will suffer tremendously. The Commission is well positioned to see what Nextel is attempting to accomplish by its latest plea for special treatment. Lausman is certain that the Commission will not force the rest of industry to pay for the ESMR Emperor's new clothes.

The Cost Of Tribute

Nextel's comments do not even scratch the service of the costs to the industry and the Commission in paying tribute to Nextel's technology and security transactions. Its comments suggest that the Commission will simply make a few changes in its records and the relicensing will be completed. SMR operators will simply change out a frequency element here and there, and it will be business as usual. End users will just drop by the shop and within moments, they will be back on the road with a retuned radio that works just fine. And if Nextel must bear the cost of a few of these simple tasks, it would be more than happy to accommodate such reasonable expenditures. Were it all so simple, then Lausman would not be so vehemently opposed.

Looking at the true cost of Nextel's proposal does not produce such a rosy and simple scenario. The Commission might consider the following:

(1) the cost of millions of frequency elements

(2) loss of value in combiners arising out of different, less efficient operation

(3) modifications to site leases which are frequency specific

(4) hundreds of intermodulation studies

(5) loss of service from repeaters during change out

(6) loss of service from end user equipment during change out

(7) cost of notifying end users

(8) cost of amending computer programs, paperwork, records, contracts and related documents produced by an ongoing SMR business

(9) cost of personnel time to be expended by the Commission, operators and end users

(10) cost of legal services necessary to revise contracts and agreements which are frequency specific, including management contracts and sales agreements

(11) cost of preparing applications to the Commission to effect licensing changes; and on and on and on...

Nothing contained within Nextel's comments addresses even an iota of the costs to be suffered by licensees, users and the Commission to provide Nextel its newest accommodation. That Nextel appears to be either unbothered or undeterred by the magnitude of its request is remarkable. But the Commission is not so blessed with an ability to be cavalier in its approach to levying costs on an industry which will derive no benefit through the expenditures demanded. The Commission must act in the public interest and Lausman truly doubts that the public is interested in paying the cost of Nextel's private fix-up.

Perhaps the one area of cost which Nextel would fail to admit will result from enactment of its proposal, and the one which might be overlooked by the Commission, is also the most expensive of all. The Commission should consider the effect on consumer confidence in traditional SMR service following such a recall to make a frequency exchange. Uneducated consumers will assume that the frequency change out is necessary because the SMR system is somehow flawed or inferior.[1] How would

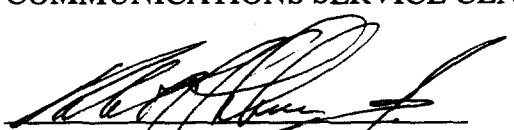
[1] Perhaps Nextel is banking on SMR customer dissatisfaction as a result of its grand restructuring to assist it in attracting customers to its essentially fungible system.

Nextel assist operators in recapturing that confidence? What price is Nextel willing to pay to calm consumer fears? None is offered and the Commission should assume that none will be forthcoming. The courts have long recognized the value of good will to a business. Nextel's plan would allow it to take that good will and gives nothing in return.

Conclusion

For the foregoing reasons, Lausman respectfully requests that the Commission summarily reject Nextel's proposals as contrary to every interest within and without the industry, with the singular exception of Nextel.

Respectfully submitted,
KEVIN LAUSMAN d/b/a
COMMUNICATIONS SERVICE CENTER

By 
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202/223-8837

Dated: July 11, 1994

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
NEXTEL COMMUNICATIONS, INC.	)	
	)	FCC File No.
Commercial Mobile Radio Service Foreign Ownership Petition	)	
	)	

To: Chief, Private Radio Bureau

OPPOSITION

KEVIN LAUSMAN

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Dated: March 11, 1994

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SUMMARY OF THE FILING

Kevin Lausman (Lausman) respectfully requests that the Commission dismiss or deny the Commercial Mobile Radio Service Foreign Ownership Petition filed by Nextel Communications, Inc. (Nextel) Nextel has requested that the Commission "permit it to retain a foreign director on its Board of Directors".

Nextel misrepresented the nature of the interest in Nextel which is held by Matsushita Communication Industrial Co., representing that Matsushita owned a directorship. However, Nextel made a substantially different representation to the Securities and Exchange Commission as to the nature of Matsushita's interest.

Nextel was not candid with the Commission. While Nextel controls a large number of authorizations for commercial radio communications service stations, Nextel specified only 44 call signs with respect to which it requested waiver of Section 310(b) of the Communications Act.

Nextel is not eligible for the waiver which it requests. Nextel admitted that it has entered into an agreement with an additional Japanese corporation to provide it with the same interest which it has provided to Matsushita, thereby demonstrating that it intends to increase the extent of foreign ownership, in violation of Section 332(c)(6) of the Act, thus making Nextel ineligible.

There is no present situation for which the Commission could grant a waiver to Nextel. Subsequent to the cutoff date for transferring a foreign interest to a different alien, a citizen of Japan left Nextel's board of directors and was replaced by a different citizen of Japan. Since the seat on the board of directors which was held by one alien has been transferred to a different alien in an untimely manner, nothing remains for which the Commission could lawfully grant a waiver.

Nextel faces a high hurdle in requesting any waiver and was required to set forth reasons in its request which would justify a waiver. Nextel presented no reason, whatsoever, why a waiver should be granted.

The United States Trade Representative has determined that Japan has violated the 1989 Third Party Radio and Cellular Agreement and the President has taken steps under Section 301 of the Trade Act of 1988 concerning Japan's refusal to trade fairly with the United States in the field of telecommunications. Accordingly, to integrate its efforts with the foreign policy of the United States, the Commission should refuse to permit any citizen of Japan to hold a position as officer or director of a common carrier subject to Section 310(b) of the Communications Act.

For all the foregoing reasons, the Commission should dismiss or deny Nextel's Petition. Based on Nextel's misrepresentation of fact and lack of candor, and because Nextel is now in violation of Section 310(b) of the Communications Act and is not eligible to obtain a waiver, the Commission should revoke all of the licenses held or controlled by Nextel.

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In the Matter of	)	
	)	
NEXTEL COMMUNICATIONS, INC.	)	
	)	FCC File No.
Commercial Mobile Radio Service Foreign Ownership Petition	)	

To: Chief, Private Radio Bureau

OPPOSITION

Kevin Lausman (Lausman), by his attorneys, hereby opposes and respectfully requests that the Commission dismiss or deny the Commercial Mobile Radio Service Foreign Ownership Petition (the Petition) filed by Nextel Communications, Inc. (Nextel). In support of his position, Lausman shows the following.

Standing

Lausman competes directly with Nextel in the field of Specialized Mobile Radio System service in the Tampa-St. Petersburg-Clearwater, Florida, area. Accordingly, Lausman has standing to file the instant Opposition.[1]

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[1] Although it is immaterial to any issue in the instant matter, in an abundance of caution, and to avoid even the appearance that Lausman is filing a strike pleading, Lausman hereby discloses that Nextel, acting by its subsidiary, Mobile Communications of Florida, Inc., has filed a legal action against him, seeking to force the sale to Nextel of SMR facilities in the Tampa-St. Petersburg-Clearwater area. Regardless of the existence or outcome of that legal action, Lausman expects to face competition from Nextel for the foreseeable future and it is the competition with Nextel which provides him standing in this matter and upon which Lausman bases the concerns which he raises in the instant Opposition.

On August 10, 1993, the Omnibus Budget Reconcilliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(c)(2)(B), *et seq.* (the Budget Act), became law. Section 332(c)(6) of the Communications Act of 1934, as amended by the Budget Act, 47 U.S.C. §332(c)(6), provides that the Commission may waive the application of Section 310(b) of the Communications Act

> to any foreign ownership that lawfully existed before May 24, 1993, of any provider of private land mobile radio service that will be treated as a common carrier as result of the enactment of the Omnibus Budget Reconcilliation Act of 1993, but only upon the following conditions:
>
> (A) the extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
>
> (B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b),

47 U.S.C. §332(c)(6).

Section 310(b) of the Communications Act provides, in relevant part, that no common carrier "license shall be granted to or held by — (3) any corporation of which any officer or director is an alien . . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license," 47 U.S.C. 301(b). Because Nextel has failed to comply with either Section 310(b) or Section 332(c)(6) of the Communications Act, and because Nextel has failed to comply with applicable Commission Rules, the Commission should dismiss or deny the waiver requested by Nextel, should determine that Nextel is in violation of Section 310(b)(3) of the Communications Act, and should order the revocation of all licenses held by Nextel and its various subsidiaries.

Nextel's Petition failed to request relief which it needed, and, instead, requested relief which the Commission has no authority to grant. Section 332(c)(6) authorizes the Commission to grant a waiver only to a "foreign ownership interest." Section 332(c)(6) does not provide any authority to the Commission to grant a waiver of Section 301(b)(3) of the Communications Act with respect to the prohibition on the licensing of a common carrier which has an alien officer or director. Having failed to request in a timely manner waiver of the foreign ownership which is enjoyed by Matsushita Communication Industrial Co. (Matsushita) in the shares of Nextel or of the right of Matsuhita to nominate a director to the Nextel board of directors (or of the foreign ownership interest enjoyed by any other person), Nextel is not eligible to receive a waiver of the foreign ownership restrictions of the Communications Act.

Under the familiar principle of statutory interpretation, *inclusio unis est exclusio alteria,* Sutherland's Statutory Construction §47.23 at 216 (1992), Congress' inclusion of a power in the Commission to waive a "foreign ownership interests" which would be prohibited by Section 310(b) of the Communications Act, Section 332(c)(6) must be interpreted to deprive the Commission of power to waive any prohibited non-ownership interest in a common carrier which is held by an alien and which might have lawfully existed prior to May 24, 1993. Therefore, Congress' enactment of Section 332(c)(6) with an express authority to grant a waiver only as to a foreign ownership interest prohibits the Commission from granting a waiver of the membership on Nextel's board of directors of Kennichi Kurokawa (Kurokawa), whom Nextel admits is a citizen of Japan.

While the Commission has, at times past, occasionally tolerated the existence of an alien director of a common carrier or broadcast licensee, no precedent is applicable to the instant matter. When the Commission has decided to permit an alien to be a director of a common carrier, it has done so with respect to a common carrier which was always fully subject to Title II of the Communications Act, and for which the existence of an alien officer or director was never lawful. In the instant matter, Congress considered the novel imposition of Section 310(b) prohibitions on situations which had been lawful prior to the enactment of the Budget Act. It decided to authorize the Commission to grant a waiver only as to a foreign ownership interest, but did not authorize the Commission to grant any waiver as to the existence of an alien officer or director. Since the Commission's authority to grant a waiver of a formerly lawful foreign ownership interest derives specifically from Section 332(c)(6) of the Communications Act, no precedent considering the Commission's authority to waive Section 310(b)(3) with respect to an alien director or officer is applicable, in any way whatsoever, to the instant matter.[2]

Nextel Misrepresented A Crucial Fact

Nextel's Petition misrepresented the nature of the interest in Nextel which is held by Matsushita. In its Petition, Nextel stated that "in 1992, in return for an equity investment, Matsushita received the right to designate one member of Nextel's nine person Board of Directors (the 'Matsushita Director')." However, at page three of the Form 10K/A2 which

[2] Because there is no applicable precedent, Section 0.332(a)(3) of the Commission's Rules appears to require the Chief, Private Radio Bureau, to refer the instant matter to the Commission *en banc* for disposition, 47 C.F.R. §0.332(a)(3).

Nextel filed with the Securities and Exchange Commission on August 11, 1993, Nextel stated that "the terms of that transaction provide, among other matters, that Matsushita is entitled, subject to certain conditions, to nominate one person for election to the Board of Directors for as long as Matsushita or its affiliates continue to own at least 50% of those 3,000,000 shares," (emphasis added), *accord*, Proxy Statement filed with the SEC by Nextel on August 23, 1993, pursuant to Section 14(a) of the Securities Exchange Act of 1934 at 3. While representing to this Commission that Matsushita had the power to "designate" one member of Nextel's board of directors, and while describing an instance in which it alleged that Matsushita had actually designated a replacement for a withdrawing board member, Nextel disclosed to the SEC that Matsushita's entitlement extended only so far, and "subject to certain conditions, [as] to nominate one person for election to the Board of Directors".[3][4]

By its misrepresentation of the nature of Matsushita's entitlement, Nextel intended to persuade the Commission that Matsushita owned the seat on the Nextel board of directors, when it had told the SEC that Matsushita's entitlement extended only to nominating a person who must

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[3] To the extent that Nextel may have granted Matsushita "the right to designate one member" of Nextel's board, then Nextel may have not been candid with the SEC. However, that is a matter for the SEC to consider and need not detain this Commission.

[4] Because of the difficulty of one's being certain whether the SEC records are complete, Lausman provided Nextel with an opportunity to review a draft of the instant Opposition and to supplement or correct any factual material. However, Nextel did not respond to the opportunity. Accordingly, Nextel should be estopped from denying any statement of fact made herein.

stand for election, and then only subject to certain undisclosed conditions. On that misstatement of fact, Nextel based its entire attempt to have the Commission determine that Matsushita owned the directorship and to have the Commission waive Section 310(b) of the Communications Act with respect to Matsushita's alleged ownership of the directorship. In view of Nextel's lack of candor concerning the nature of the entitlement enjoyed by Matsushita, the Commission should dismiss or deny Nextel's Petition and should designate all licenses held by Nextel and its corporate affiliates for hearing to determine whether Nextel has the character qualifications required to be a Commission licensee.

While Nextel referred to "Matsushita's directorship interest", it is blackletter law of American corporations that "directors are not agents of the shareholders who elect them, but are sui generis. As persons in control of the property of others, directors are fiduciaries, with their duties running primarily to the corporation," H. Henn, Handbook of the Law of Corporations §207 (1970). Further, a director cannot contract away his right and duty to exercise his independence, because any contract where the director of a corporation limits his discretion and judgment is void as against public policy, Fletcher, Cyclopedia of Corporations §280 (1986). While it may come to as a rude shock to Matsushita that the "Matsushita director," Nextel Petition at 3, has a primary duty to a person other than Matsushita, Nextel knew or should have known that Matsushita owns no such thing as a "directorship interest" in Nextel. The simple fact is that Nextel has on its board a Mr. Kurokawa, a citizen of Japan, an alien, who may be loyal to Matsushita, but Matsushita owns neither Kurokawa, nor his vote in a Nextel board meeting, nor any guarantee that it can designate his reelection or his replacement by another

Matsushita Man. Knowing the truth, Nextel should have told the Commission the truth, but it did not.

Nextel Was Not Candid With The Commission

Not only did Nextel misrepresent a fact of decisional significance, Nextel was also not candid with the Commission. The Commission required Nextel's petition to "clearly specify the licensee's name, radio service, call sign(s), station address(es) or geographical location(s), and contact person with telephone number," First Report and Order in GN Docket No. 93-252 at para 12 (Released January 5, 1994 FCC 94-2) (First Report and Order). Rather than being fully candid as to the full extent of the license portfolio held by Nextel and by Nextel's wholly-owned subsidiaries, Nextel supplied the Commission with the call signs of only 44 stations. For none of the stations which it identified did Nextel comply with the Commission's requirement that it supply the station address and a contact person with a telephone number. For this reason, alone, Nextel's request is defective on its face and should be dismissed.

Not only did Nextel not supply the Commission with the required data which might have allowed the Commission to check the accuracy of Nextel's report, Nextel did not even identify the wholly-owned subsidiaries which hold licenses which are to become Commercial Mobile Service authorizations in 1996, thereby depriving the Commission of any opportunity to compile its own complete and reliable listing of the facilities controlled by Nextel. Nextel could easily have been candid with the Commission. Instead, referring only vaguely to un-named co-

conspirators, Nextel chose to try to mislead the Commission as to the extent of the license holdings which it controls.

Based on published reports and on Lausman's own knowledge of the Specialized Mobile Radio System market, Lausman believes that Nextel and its subsidiaries are among the three largest holders of SMR licenses in each of the Top 50 United States markets. However, the trivial quantity of license information supplied by Nextel would hardly permit the Commission to determine the true extent of Nextel's dominance of the SMR field in any American market. Since the extent of foreign interests in domestic American radio communication facilities is the core issue in the instant matter, it behooved Nextel to disclose to the Commission the full extent of the facilities for which waiver was requested.

Where one corporation is the sole owner of a subsidiary, it is obvious that the actions of the board of directors of the parent are fully effective as to the policy to be carried out by the subsidiary. Accordingly, not only should Nextel have correctly represented the nature of the presence on its board of a citizen of Japan, it should have disclosed the full extent of the radio facilities over which that alien would have the power of a corporate director.

In view of Nextel's willful lack of candor, the Commission should dismiss or deny Nextel's waiver request and take such other action as may appear to be appropriate to an instance of an egregious lack of candor. Alternatively, the Commission might choose to consider Nextel's request, but only as to those radio station facilities which Nextel identified by

call sign as being affected by the presence on its board of a citizen of Japan. As to all other stations controlled by Nextel, the Commission should hold that Nextel did not file a timely waiver request, and, therefore, no waiver will be granted with respect to those stations. Since no waiver can be granted with respect to those stations, the Commission should proceed pursuant to Section 310(b) of the Communications Act and revoke all of those licenses.

Nextel made no reference to whether it managed any radio communication facility for which neither Nextel nor any subsidiary of Nextel holds the license. In the absence of complete information concerning the extent to which Nextel conducts the day-to-day operations of domestic American commercial radio communication facilities, and, therefore, the full extent to which the presence of an alien director on Nextel's board would affect Commercial Mobile Service operations in the United States, Nextel failed to place the Commission in a position in which it could grant Nextel's request. Accordingly, the Commission should dismiss or deny Nextel's request.

Nextel Is Ineligible For The Requested Waiver

Lausman has shown that Matsushita does not own a directorship on the Nextel board. However, assuming, *arguendo*, that Matsushita's entitlement did include the right to impose its choice of director on Nextel, and that it is that foreign ownership interest for which Nextel has requested waiver, Nextel disclosed facts in its waiver request which deprive it of eligibility for the requested waiver. At page three, footnote four of its Petition, Nextel admitted that it has "executed a definitive agreement with Nippon Telephone and Telegraph Company ("NTT")

which, *inter alia*, will permit NTT to be represented by a director on Nextel's board later this year." Thereby, Nextel admitted that it has already agreed to sell to another alien an ownership interest in Nextel which is identical to the ownership interest which it claims exists in the alien Matsushita. Clearly, Nextel's arrangement with NTT would violate Condition (A) which Section 332(b)(6) imposes on the Commission's authority to grant waivers, because Nextel has admitted that it has already agreed to increase the extent of foreign ownership in Nextel above the extent which existed on May 24, 1993. In view of the fact that Nextel cannot comply with Condition (A) without breaching its contract with NTT, and in view of the fact that Nextel has declared its intention to violate Condition (A), Nextel is not eligible to request, and the Commission is not authorized to grant, any waiver to Nextel of Section 310(b) of the Communications Act.

Overlooking the limitation on the Commission's waiver authority which make waiver available only as to those foreign ownership interests which existed as of May 24, 1993, Nextel blithely attempted to finesse its executory agreement with NTT by saying that it would "take all steps necessary to comply with the foreign ownership restrictions of Section 310(b)(4) of the Act prior to" the time that it consummated its deal with NTT, *id.* Apart from the lack of authority in the Commission to waive Section 310(b)(4) as to any interest arising subsequent to May 24, 1993, Nextel's statement skipped over the equally significant effect of Section 310(b)(3) on its deal with NTT. Since there is nothing, whatsoever, that Nextel can do to obtain a waiver of the prohibition of its having any alien director (to say nothing of its planned increase in the number

of alien directors), the Commission should dismiss or deny Nextel's Petition because Nextel has admitted that it has no intention of complying with a condition which Congress established.[5]

In view of Nextel's admission that it has already agreed to provide NTT with essentially the same benefits as it has provided to Matsushita, Nextel failed to supply the Commission with nearly enough information to allow the Commission to grant Nextel's Petition. Although Kurokawa has as much power on the board as could be obtained by the votes of 11 percent (one-ninth) of Nextel's shares, and although a director who would act in the interest of NTT would raise that percentage to 22 percent (well over the one-fifth limit on foreign ownership), Nextel provided the Commission with no information which would allow the Commission to assess the actual extent of interests held by foreign nationals. Nextel did not supply the Commission with the number or percentage of shares which Matsushita bought which entitled it also to enjoy a seat on the Nextel board. Neither did Nextel supply the Commission with copies of the agreements between it and Matsushita and between it and NTT. If the Commission were to understand the instant matter fully, it would have to require Nextel to supply all such information and permit the public to scrutinize and comment on that information. Since Nextel failed to supply essential information concerning the true extent of foreign ownership and the extent to which the extent might be disproportionate to the extent of actual investment of aliens

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[5] Assuming, *arguendo*, that Nextel's characterization of Matsushita's entitlement was correct, and that Matsushita and NTT would have the absolute right to impose their choices for two members of a nine person board of directors, then those combined interests would effectively exceed the limitation on alien ownership of capital stock provided by 47 U.S.C. §310(b)(3), because Matsushita and Nextel would have greater power to select members of the board than the votes of one-fifth of the shareholders of capital stock.

in the corporation, the Commission should dismiss or deny Nextel's request, or require that it submit for public review such information as would allow the Commission to make a fully informed decision.

Although Lausman caused a diligent search to be made of the records of the SEC, no report was found disclosing either the nature of the arrangment which Nextel has with NTT or the date on which the arrangment was entered into by the parties. Since Nextel did not specifically request that the Commission waive its extension to NTT of the same entitlement which it has provided to Matsushita, Nextel appears not to take the position that the existence of the executory agreement prior to the filing of Nextel's Petition is sufficient to support a request for waiver as to the interest of NTT. If Nextel does not claim that the executory contract with NTT is sufficient to establish a present prohibited interest in NTT, then not only will Nextel be barred from requesting waiver at any later time, but the Commission will be faced with a problem, because another person requesting waiver of the prohibitions of Section 310(b) has taken the position that the timely existence of an executory contract was sufficient to avoid violating the conditions on waiver imposed by Section 332(c)(6) of the Communications Act.

At footnote 11 to its petition for waiver, MAP Mobile Communications, Inc. disclosed that it had entered into a contract or contracts to sell shares to two aliens prior to May 24, 1993, but that it did not receive their investments and did not issue shares to them prior to May 24. MAP's position is that the issuance of the share certificates did not violate the conditions on waiver because the transfer of funds and share certificates subsequent to May 24 were merely

"ministerial" acts. Although Nextel might have taken the same position as MAP, it does not appear that Nextel takes the position that the existence of its contract with NTT is sufficient to avoid violating the conditions. Since the two legal positions cannot be harmonized, the Commission should study both requests carefully to determine whether either is correct.

Subsequent to the filing of its Petition, on or about March 3, 1994, Nextel announced that it had entered into an agreement with MCI Communications Corporation (MCI), under which MCI is to acquire an interest in Nextel. Pursuant to Section 1.65 of the Commission's Rules, if not dismissing or denying Nextel's Petition on any of the bases set forth herein, the Commission should require Nextel to report to it whether any share, whatsoever, in MCI is held by an alien. If so, then Nextel's Petition would have to be denied beause the extent of foreign ownership in Nextel would increase above the extent which existed on May 24, 1993, *see*, 47 U.S.C. §332(c)(6)(A).

Nextel Failed To Comply With The Requirements For Waiver

The plain fact is that Nextel has no situation for which the Commission can grant a waiver. On May 24, 1993, Nextel had an alien director named Takashi Kawada (Kawada). On July 19, 1993, Kawada was no longer a member of Nextel's board, but had been replaced by Kurokawa. Since Section 332(b)(6) of the Communications Act does not permit the Commission to grant a waiver for any transfer of ownership occurring after May 24, 1993, *see*, First Report